Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

DARLENE M. BASSETT,

Petitioner,

v.

AMERICAN GENERAL FINANCE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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78 pp

QUESTIONS PRESENTED FOR REVIEW

Federal courts throughout the Nation are grappling with large institutional creditors' strategies to circumvent the bankruptcy discharges of our poorest Citizens through coercive reaffirmation agreements, leading to widely disparate results among the Circuits. Overruling its own unanimous Bankruptcy Appellate Panel in the published opinion below, the Ninth Circuit Court of Appeals has sanctioned an especially egregious form reaffirmation agreement, raising the following federal questions:

I. Does an institutional creditor's nationwide form reaffirmation agreement satisfy Congress' requirement for "clear and conspicuous" notices to bankruptcy debtors that (a) reaffirmation of debts is not required and (b) may be rescinded, when the latter "notice" is set forth in lower case letters coupled with a false warning that rescission constitutes default, while the former is in all upper case letters?

II. Does a creditor's violation of the post discharge injunction under Bankruptcy Code § 524 by use of a statutorily defective (and hence void) reaffirmation agreement entitle aggrieved debtors to damages by implication under Code § 524, or under Code § 105(a)?

III. Does the Truth in Lending Act's exclusion for judicially-approved settlement agreements apply to reaffirmation agreements which are not reviewed by bankruptcy judges?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Darlene M. Bassett respectfully requests a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at 285 F.3d 882 (Appendix A, 1a to 9a). The opinion of the Bankruptcy Appellate Panel for the Ninth Circuit is published at 255 B.R. 747 (Appendix B, 10a to 30a). The judgment of the Bankruptcy Court for the Western District of Washington at Seattle is not published but was filed on January 21, 2000 (Appendix C, 31a to 32a). The transcript of the Proceedings before the Bankruptcy Court for the Western District of Washington at Seattle is not published but is dated January 21, 2000 (Appendix D, 33a to 43a). The order of the United States Court of Appeals for the Ninth Circuit denying Petition for Rehearing and Rehearing En Banc is not published but was filed on May 24, 2002 (Appendix E, 44a).

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on April 9, 2002. The Court of Appeals denied a timely petition for rehearing en banc on May 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The provisions of 11 U.S.C. § 524 and § 105 that are relevant to this action are as follows:

Section 524. Effect of Discharge.

(a) A discharge in a case under this title—

. . .

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;

. . .

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part is based on a debt that is dischargeable in a case under this title is enforceable only to the extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of a discharge under section 727, 1141, 1228, or 1328 of this title;

(2) (A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law or

under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

Section 105. Power of court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

STATEMENT OF THE CASE

This case concerns the schemes of large, institutional creditors to deny citizens at the bottom of our ailing economy the promise of a fresh start in bankruptcy. The published opinion of the Court of Appeals permits these practices to continue unimpeded, despite prior conflicting decisions of this Court, other Circuits, and a unanimous Bankruptcy Appellate Panel ("BAP") below. The seemingly nominal sums at stake are enormous to individual debtors such as Ms. Bassett; in the aggregate, the opinion countenances abusive creditor strategies designed to circumvent the bankruptcy discharge injunction, which enable large financial institutions to recover many millions of additional dollars annually from beleaguered debtors–*after* discharge. The Court of Appeals' imprimatur facilitates creditor efforts nationwide to coerce debtors into reaffirming debts, despite Congressional enactments designed to discourage the practice in the Bankruptcy Code.

Creditors such as the respondent, American General Finance, Inc. ("AGFI"), love reaffirmation agreements as much as they hate bankruptcy discharges. Creditors holding reaffirmed debts are in fact usually better off due to the discharge of debtors' other prepetition obligations. Every reaffirmed debt, however, hampers a beleaguered debtor's fresh start, and there is rarely (if ever) any sound reason for any debtor to reaffirm any debt. It is thus not surprising that reaffirmation agreements are disfavored under the Bankruptcy Code; indeed, reaffirmation agreements between creditors and pro se debtors—which require judicial review—are seldom approved by bankruptcy judges.

Creditors who love reaffirmation agreements most are those holding unsecured or undersecured debts—the very debts that should rarely, if ever, be reaffirmed, considering the debtor's best interests. Fully secured creditors care little about the debtor's continuing personal liability because they can simply repossess their collateral if the debtor fails to service the secured debt postdischarge. (Although the debtor's personal liability is discharged, the lien on the collateral "rides through" the bankruptcy case.) Unsecured

or undersecured creditors, on the other hand, have little real leverage over debtors after discharge, and often attempt to bluff debtors into reaffirmation agreements by falsely threatening dischargeability litigation or repossession of collateral with negligible liquidation value (such as home furnishings).

Consumer debtors such as the petitioner, Darlene Bassett, who are represented by overworked, underpaid bankruptcy counsel, present institutional creditors with an ideal opportunity to circumvent the discharge injunction, because reaffirmation agreements with such debtors are not reviewed by bankruptcy judges. Congress, however, attempted to plug this loophole when it set forth the central requirements for enforceable reaffirmation agreements: the inclusion of two clear and conspicuous notices, in the agreement itself, advising the debtor initially that reaffirmation is not required under the Code, and that for at least two months thereafter, the debtor may freely rescind the reaffirmation agreement. Congress clearly did not intend to rely solely upon the advice of debtor's counsel, but put the burden on creditors seeking reaffirmation to spell out debtors' rights in their form agreements.

The right-to-rescind notice is especially important because the actual experience with one or two monthly payments on the reaffirmed debt—usually after the attorney-client relationship has ended—will prompt the debtor to revisit the wisdom of the initial reaffirmation decision. In this case, AFGI chose to bury the right-to-rescind notice in lower case type, surrounded by other provisions in upper case, and coupled it with a false statement that rescission would itself constitute a default. Even though the rescission-not-required notice is clear and conspicuous by both its placement in the agreement directly above the debtor's signature and its presentation in upper case type, the more important right-to-rescind notice is de-emphasized by both its nonconspicuous placement in the middle of the document and its presentation in lower case type. In the process of unwittingly aiding AGFI's strategy for circumventing the discharge injunction, the Court of Appeals departed from prior precedent of this

Court and other Circuits as to the meaning of "clear and conspicuous" and other matters of law.

A. Background of the Bankruptcy Court and Bankruptcy Appellate Panel Decisions.

"Brevity [may] promote[] conspicuousness", Appendix 7a, but when the very subject of a conspicuity analysis is itself abbreviated, sound legal analysis is compromised. The form reaffirmation agreement ("Agreement") used by respondent AGFI in this case, is thus reproduced in full by lodging with this Court a true and correct reproduction of the actual Agreement signed by Darlene Bassett. The Agreement is also reproduced in Appendix F (45a to 47a)

After filing her Chapter 7 bankruptcy petition, Darlene Bassett was approached by three large institutional creditors seeking payment of her prepetition debts. She struggled to pay all three creditors during and after her bankruptcy case, paying nearly $2,000 to AGFI alone. Ultimately, she lost her home and was forced to consult new counsel in an effort to seek the relief she had been denied in bankruptcy through improvident reaffirmations: her fresh start. (Ms. Bassett's claims against the other two creditors—*Bassett v. Green Tree Financial, Inc.*, Adv. No. A99-09637 (Bankr. W.D. Wash.), and *Bassett v. Norwest Financial Washington, Inc.*, Adv. No. A99-09636 (Bankr. W.D. Wash.)—have been settled).

AGFI is one of the largest consumer finance companies in the country with over $11 billion in assets, two million customers, and offices in 41 states, Puerto Rico, and the U.S. Virgin Islands. It is a subsidiary of American General Finance Corporation, one of the nation's largest diversified financial service organizations with assets of $110 billion, $7.6 billion in shareholders' equity, and more than 12 million customers. AGFI has collected monies from Ms. Bassett and the Class by means of its unlawful reaffirmation agreements.

The Proceedings Below.

Ms. Bassett filed her voluntary Chapter 7 bankruptcy petition on May 2, 1997 in the United States Bankruptcy Court for the Western District of Washington, Case No. 97-6014. (Her reaffirmation agreement with AGFI was signed

on July 2, 1997 and filed on July 15, 1997.) Ms. Bassett received her discharge on September 16, 1997, and her bankruptcy case was closed on October 10, 1997.

Darlene Bassett's bankruptcy case was reopened on August 6, 1999, and her Complaint for Injunctive and Other Equitable Relief and for Money Damages was filed on August 20, 1999. She filed her Amended Class Action Complaint ("Complaint") on November 8, 1999. AGFI answered the Complaint on November 24, 1999.

AGFI moved for judgment on the pleadings on December 10, 1999, and the motion was heard on January 21, 2000. At the conclusion of oral argument, the bankruptcy court dismissed the Complaint in its entirety. The court agreed that there was "an argument" that the right-to-rescind notice under 11 U.S.C. § 524(a)(c)(2)(A) was defective, Appendix 41a, but nonetheless dismissed the Complaint because Ms. Bassett's original bankruptcy attorney had signed off on Bassett's reaffirmation agreement with AGFI, effectively curing all other defects under § 524.[1] (*Id.*)

Ms. Bassett appealed the dismissal to the BAP. The BAP reversed in part and affirmed in part, holding that AGFI's form reaffirmation agreement is invalid under § 524, and was hence void *ab initio*. The BAP further held that Ms. Bassett may enforce the discharge injunction through civil contempt proceedings, but not through an implied private right of action under § 524. The BAP also reversed the dismissal of Ms. Bassett's claim for violation of the automatic stay, but affirmed the dismissal of her state law and TILA claims.

AGFI appealed to the Court of Appeals. Ms. Bassett cross appealed, except the dismissal of her state law claims. The Ninth Circuit reversed the BAP's central holding—that AGFI's form reaffirmation agreement is void—which effectively disposes of the Complaint. The Court of Appeals also denied Ms. Bassett's petition for rehearing *en banc*. Ms. Bassett timely petitions this Court for a Writ of Certiorari.

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[1] Except as otherwise noted, all references to section numbers refer to sections of the Bankruptcy Code, 11 U.S.C. §§ 101 through 1330.

REASONS FOR GRANTING THE WRIT

"[J]ust three sentences" was all the Court of Appeals deemed necessary to quote from the Agreement, Appendix 4a, and by focusing on these three sentences only, rather than the entire agreement, was able to conclude that two of the three sentences set forth with requisite conspicuousness the two notices which Congress requires to be in all reaffirmation agreements. *See* 11 U.S.C. § 524(c).[2] As to the remainder of the first page from which these three sentences were parsed, according to the court, "[m]uch of this is white space." Appendix 4a.

The second notice—that reaffirmation is not required—appears near the bottom of the first page, all in capital letters. That notice, though oddly worded, is conspicuous. Just above that notice, however, diluted by threatening additional verbiage not prescribed by Congress and set forth in the smallest font in the agreement is the first prescribed "notice"—that the debtor may rescind the reaffirmation agreement up to 60 days later. This right-to-rescind notice is de-emphasized both by the succeeding provision in all capitals and the preceding account information, both in a larger font size and with a significant portion in all capitals.

The first, right-to-rescind "notice" does not utilize CAPITAL LETTERS LIKE THE SECOND NOTICE. It is surrounded by "conspicuous" provisions in capital letters and/or larger font size and is diluted by the additional verbiage not specified in the Bankruptcy Code which ominously warns the debtor that "[r]escission of the

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[2] Section § 524(c) permits enforcement of a reaffirmation agreement only if, *inter alia*, the agreement (1) "contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim" (§ 524(c)(2)(A)); and (2) "contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection" (§ 524(c)(2)(B)).

Reaffirmation Agreement shall be considered default under the terms and conditions of the Installment Agreement referred to above." Acknowledging that this chilling additional "sentence is not strictly accurate in all cases", Appendix 7a, the Court of Appeals found it necessary to invoke a "fact" not in the record on appeal to conclude the sentence was harmlessly included in this case. Appendix 8a. The Court of Appeals further held that certification of the Agreement by debtor's counsel purged any illegal effect of AGFI's strategic draftsmanship. (*Id.*).

The Opinion does violence to the statutory scheme enacted by Congress, and conflicts with prior precedent of this Court and other Circuits. Most tragically, the Opinion makes it possible for large institutional creditors to circumvent the discharge injunction with impunity, denying impoverished consumer debtors the benefit of a fresh start in bankruptcy.

I. THE OPINION SANCTIONS AN ILLEGAL REAFFIRMATION AGREEMENT DESPITE CONTRARY PRECEDENT FROM THIS COURT AND OTHER CIRCUITS, A UNANIMOUS BAP BELOW, AND CONGRESS' LEGISLATIVE SCHEME.

Because Congress intended that a reaffirmation agreement be consensual, courts have generally insisted that such agreements strictly comply with the conditions enumerated in the statute. *Jamo v. Katahdin Federal Credit Union*, 283 F.3d 392, 398 (1st Cir. 2002) (addressing whether a credit union violated an automatic stay in reaffirmation negotiations, citing *Whitehouse v. Laroche*, 277 F.3d 568, 575 (1st Cir. 2002)). Similarly, courts have insisted upon a showing that a reaffirmation agreement is not the product of abusive creditor practices. *Jamo*, 283 F.3d at 398 (citing *In re Duke*, 79 F.3d 43, 44-45 (7th Cir. 1996)). Overall, § 524(c) is intended to protect a reaffirming debtor from unsound or unduly pressured judgments about whether to attempt to repay dischargeable debts. *Id.*

The protective nature of § 524(c) would be undermined if debtors were unaware of the voluntary nature of the reaffirmation or of the right to rescind the agreement. Thus, § 524(c) requires a "conspicuous" statement to notify debtors of their rights. The underlying intention of a conspicuous term or provision is to draw the attention of the reader to the text. *See, e.g., Rivera v. Grossinger Autoplex, Inc.*, 274 F.3d 1118, 1122 (7th Cir. 2001) (holding that the use of labels and capitalization to draw a reader's attention to material portions of a document satisfies conspicuity requirements); *Eagle Bus Mfg. v. Rogers*, 62 F.3d 730, 740 (5th Cir. 1995) (reasoning that a warning to creditors to file a proof of claim was not conspicuous because it did not necessarily draw the reader's attention); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 296 (5th Cir. 1993) (notice not conspicuous because there was nothing in the notice to draw the reader's attention to it). In the AGFI reaffirmation agreement, the attention of the reader is not drawn to the right-to-rescind provision. Instead, the reader's attention is drawn to other provisions, which results in the reader's attention being drawn away from the right-to-rescind provision.

Under federal law, contrasting typeface or formatting is the most common characteristic of a conspicuous term or provision; it draws the reader's attention to important language that is visually distinguishable from the surrounding text. The majority of federal circuit courts have found a provision conspicuous if it contains typeface or formatting that is bolded, capitalized, italicized, and/or underlined. The more contrast used in the term (i.e., a combination of bolded, capitalized *and* underlined type), the more likely it is to be conspicuous. For example, in *Yu v. Albany Ins. Co.*, 281 F.3d 803, 807 (9th Cir. 2002) (applying Hawaii law), the court found that an insurance policy warranty was conspicuous where it was printed in bold, capitalized, *and* underlined letters.[3]

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[3] *Compare, Sierra Diesel Injection Service, Inc. v. Burroughs Corp. Inc.*, 874 F.2d 653, 658 (9th Cir. 1989) (finding warranty disclaimer clauses that were capitalized inconspicuous).

Similarly, in *Rivera v. Grossinger Autoplex, Inc.*, 274 F.3d at 1122, the Seventh Circuit examined a "clear and conspicuous" disclosure required under the Truth in Lending Act ("TILA"). *See* 12 C.F.R. § 226.4(d)(3)(i). The disclosure, located in an addendum to a financing agreement, was conspicuous under TILA because important portions of the disclosure were capitalized, italicized, and labeled. *Rivera*, 274 F.3d at 1122. *See also*, *Smith v. Check-N-Go*, 200 F.3d 511, 516 (7th Cir. 1999) (stating that disclosures on a loan agreement were conspicuous because they were in bold, capitalized type); *Hatfield v. Board Of County Comm'rs*, 52 F.3d 858, 865 (10th Cir. 1995) (finding a disclaimer in an employment contract conspicuous because the text was prominently printed in capital letters and was the only text on the one-page document). By contrast, AGFI has done absolutely nothing to make the right-to-rescind provision conspicuous in its reaffirmation. That provision is buried in the middle of the agreement in lower case type, surrounded by other provisions that are conspicuous.

Courts also consider the comparative size of the typeface when examining whether a provision is conspicuous; typeface that is smaller than the rest of the document is not conspicuous. *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803, 805 (7th Cir. 2001). In *Lifanda*, the Seventh Circuit examined a TILA disclosure regarding terms of insurance that were set forth on an Auto Registration form. Under the statute, such disclosures must be made "clearly and conspicuously." *See* 12 C.F.R. § 226.17. Reading the terms in context, the court reasoned that "the term 'conspicuous' cannot be met as a matter of law by type disproportionately small to that in the rest of the document, and which is itself barely legible." *Id.* at 808. Because the disclosure was set forth in the smallest type, it was not conspicuous. *Id.*

Furthermore, where a term's typeface is *not only* smaller than the rest of the text, but it is *also* adjacent to larger, bolded typeface, the term is decidedly inconspicuous. *Stevenson v. TRW Inc.*, 987 F.2d at 294. The AGFI Agreement suffers from that precise defect. The right-to-rescind notice is surrounded by conspicuous provisions in all capital letters,

making the right-to-rescind provision decidedly inconspicuous.

In *Stevenson*, the Fifth Circuit examined a two-page credit report that required a "conspicuous" notice under the Fair Credit Reporting Act ("FCRA"). The notice was located on the back of the first credit report, and consisted of a single sentence within a paragraph of text. *Id.* at 295. The court noted that the notice was neither underlined nor bolded, although the paragraphs above and below the notice were in large, bolded font.[4] *Id.* Despite the fact that each front page of the two page credit report instructed the reader in red, boldface type to see the reverse for "Explanation & Instructions," the court concluded that the notice did not draw the reader's attention and thus, was not conspicuous. *See also*, *Lutz Farms v. Asgrow Seed Company*, 948 F.2d 638, 646 (10th Cir. 1991) (applying Colorado law to find a warranty and disclaimer ineffective; the disclaimer was "not in larger or bolder type than the other printing on the invoice or on the labels of the seed pails"). Similarly, the right-to-rescind notice in the AGFI Agreement does not draw the reader's attention.

The standard rule of *contra proferentem* provides that when one party is responsible for the drafting of an instrument, any ambiguity will be resolved against the drafter absent evidence indicating a contrary intention of the parties. *Winters v. Costco Wholesale Corp.*, 49 F.3d at 554 (9th Cir. 1995). Furthermore, cases involving consumer protection statutes such as TILA view the sufficiency of statements from the standpoint of an ordinary consumer. *See, e.g. Lifanda*, 237 F.3d at 806. As mentioned above, § 524(c) of the Bankruptcy Code has a similar protective standpoint toward debtors in bankruptcy proceedings.

Other courts find that an unclear or misleading provision is unenforceable altogether. *See, e.g., Paladino v.*

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[4] The court looked to the UCC § 1-201(10) (1992) which states that a printed heading in capitals is conspicuous. Likewise, larger or other contrasting type or color found in the body of a text is conspicuous. *Stevenson*, 987 F.2d at 295.

Avnet Computer Techs., 134 F.3d 1054, 1059-60 (11th Cir. 1998) (holding that contradictory provisions in an arbitration agreement rendered the agreement unenforceable); *Bartlett v. Heibl*, 128 F.3d 497, 500 (7th Cir. 1997) (holding that if a notice required under the Fair Debt Collection Practices Act ("FDCPA") is overshadowed by contradictory or confusing information, the requirement to give the notice is not satisfied); *Chauncey v. JDR Recovery Corp.*, 118 F.3d 516, 518-19 (7th Cir. 1997) (holding that the inclusion of contradictory information along with a notice required under the FDCPA renders the required notice ineffective); *Russell v. Equifax*, 74 F.3d 30, 34 (2d Cir. 1996) (finding that "When a notice contains language that 'overshadows or contradicts' other language informing a consumer of her rights, it violates the [FDCPA].); *Miller v. Payco-General American Credits, Inc.*, 943 F.2d 482, 484 (4th Cir. 1991) (a required notice that is overshadowed or contradicted by other notices is not effective); *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1381 (11th Cir. 1984) (holding that even disclosure of a nonexistent right is confusing and invalidates an otherwise conforming notice under Regulation Z); *Gresham v. Termplan Inc. West End*, 648 F.2d 312, 312-14 (5th Cir. 1981) (holding that the inclusion of contradictory information that was not required along with a required disclosure, in a manner that was confusing to a borrower and detracted from required disclosure, rendered the required disclosure not in compliance with the requirements of the Truth in Lending Act and Regulation Z). Applying the reasoning relied on in the above cases to the requirements of § 524(c), where a "clear and conspicuous" statement regarding the right to rescind is provided in accordance with § 524(c), but the statement is contradicted by other language in the agreement, the provision does not adhere to the requirements of the Bankruptcy Code, and the notice requirement is not met.

AGFI inserted additional language into the Agreement purporting to "advise" debtors of the effect of rescission. The extra language both precedes and follows the required right-to-rescind notice, and all of it–including the required notice–is in lower-case lettering. According to the paternalistic drafter, the "default" language is benignly intended to inform

debtors that rescission returns the parties to the "status quo". To Ms. Bassett and similarly-situated debtors, however, the plain inference (regardless of intended implication) is that rescission of the reaffirmation agreement (up to two months after the initial "consultation" and signing, and after two months of payments on reaffirmed debt) will constitute further default in and of itself, thereby discouraging exercise of that right. Even the Ninth Circuit recognized that AGFI's public service announcement is at best "not strictly accurate" as to any debtor who is not in default in her credit relationship with AGFI on the petition date. Appendix 7a. The court nonetheless concluded that this threatening sentence is accurate in this case "because [Ms. Bassett] was in default when she applied for bankruptcy." Appendix 8a[5] However, this "fact" appears nowhere in the record on appeal. In fact, AGFI conceded in its Reply Brief at page 4, note 6 that no such "fact" is of record. Thus, the Opinion is in

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[5] In adopting AGFI's proffered interpretation of this extra sentence, the Court also fails to address the plain conflict in myriad cases setting forth the fundamental rule prohibiting construction of contract language *in favor of* the drafter. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Ms. Bassett's construction, by contrast, presents the most plausible explanation for this threatening inclusion: AGFI intended to discourage subsequent rescission by implying that exercise of this right would, in and of itself, constitute an additional default—thus completely negating the effect of the prescribed notice, and along with it debtors' substantive right to rescind reaffirmation agreements. That Congress plainly wanted debtors to have the right to revisit the reaffirmation decision up to two months later (thus affording debtors an opportunity to experience the actual impact of the reaffirmed debt payments on their solvency) could even be deemed prophetic, knowing as we do now that most consumer debt (secured here by "two chairs and two ottomans", Appendix 2a, that AGFI would never have repossessed) should never have been reaffirmed. Culhane, M. and M. White, "Debt After Discharge: An Empirical Study of Reaffirmation", 73 Am. Bank. L.J. 709 (1999). Finally, the Court's error is evident even on procedural grounds. The context of AGFI's request for relief (a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c)), required the creditor to show that there are no conceivable facts entitling Ms. Bassett to relief. Ms. Bassett's construction of the "extra" language in AGFI's Agreement is not just conceivable, it is the most plausible; consequently, AGFI's motion should have been denied. The Opinion is similarly erroneous.

part based upon an unfounded assumption of a fact not in the record.

Since the Opinion already recognizes that AGFI's additional language is inaccurate where a debtor is not in default on the petition date, the Court must further acknowledge that such inaccuracy on this record necessarily destroys the effectiveness of the right-to-rescind notice in the Agreement. The BAP should have been be affirmed on this basis alone; the Opinion is in error by relying on a "fact" outside the record.

The Opinion explains that conspicuity is decided as a matter of law, "not because judges are experts at graphic design, but because subjecting conspicuousness to fact-finding would introduce too much uncertainty into the drafting process." Appendix 4a. The diametrically opposed results in the Opinion and the other decision cited above, however, only compound drafting uncertainty. Indeed, the Seventh Circuit has held that confusion caused by additional contradictory language included in a letter that also set forth a required FDCPA notice is a question of fact that cannot be decided without allowing the plaintiff to show how an unsophisticated consumer might be confused. *See Jewel Marshall-Mosby v. Corporate Receivables, Inc.*, 205 F.3d 323, 326 (7th Cir. 2000).

As noted above, the Opinion erroneously asserts that Ms. Bassett was in default of her credit agreement with AGFI on the petition date—a "fact" wholly outside the record on appeal. Perhaps mindful of the nonexistent support for this assertion in the record, the Opinion continues:

> Even if she hadn't been [in default], Bassett was not forced to rely solely on the agreement's statement of the law: The attorney declaration *accompanying* the reaffirmation agreement states that the attorney had "fully advised the debtor...of the legal effect and consequences of default under [the reaffirmation] agreement." ***Because she received this independent legal advice, she***

cannot argue that the reaffirmation agreement is misleading.

Pet. App. 8a. (emphasis added).

While the court thus appears to mistakenly believe that the attorney certification is separate and apart from the reaffirmation agreement, § 524(c) makes clear that the attorney certification is neither a separate document nor a substitute for any of the notices Congress requires for reaffirmation agreements. Rather, the attorney certification is an integral, additional requirement for every enforceable reaffirmation agreement. To conclude that such "independent legal advice" deprives Ms. Bassett of any argument that the Agreement is otherwise defective under § 524(c) makes these separate statutory requirements disjunctive when Congress plainly made them conjunctive. The Opinion, consequently, is contrary to this Court's decisions in *United States v. Menasche*, 348 U.S. 528 (1955), and *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), which mandate that courts strive to give full content to every part of Congressional enactments. Although Congress plainly required both of the notices *and* the signature of debtor's attorney, the Court of Appeals repeals the notice requirements of § 524 when it relies on the attorney signature to effectively cure the defective notice.

Further the Ninth Circuit's reliance on the "independent legal advice" purportedly given to Ms. Basset by her counsel assumes a level and thoroughness of advice that seldom exists in the area of consumer debtor representation. The very fact that Ms. Bassett's debt to AGFI, secured only by "two chairs and two ottomans", Appendix 2a, was reaffirmed at all demonstrates that real legal advice for impoverished consumer debtors like her is largely illusory. Yet Ms. Bassett's experience is tragically consistent with the empirical evidence in the record: "[D]ebtors' counsel have not been effective guardians of their clients' financial interests. Too often, they approve reaffirmations which debtors' income and expense schedules show will become an undue burden." (Culhane and White, *supra* at 764.)

II. AGFI'S ILLEGAL REAFFIRMATION AGREEMENT VIOLATES THE POST-DISCHARGE INJUNCTION OF § 524, ENTITLING MS. BASSETT AND SIMILARLY SITUATED DEBTORS TO DAMAGES BY IMPLICATION UNDER § 524 OR UNDER § 105(a) OF THE BANKRUPTCY CODE.

There are two separate bases upon which this Court should hold that Ms. Bassett may maintain her action for AGFI's violations of § 524. First, under the authority of this Court's decision in *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)[6], there is an implied private right of action for a creditor's violations of § 524. Second, § 105(a) authorizes the bankruptcy court to enter orders enforcing the provisions of the Bankruptcy Code, separate from the court's authority to issue orders for contempt.

The Court's four factor test for implied rights of action are:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," (citation omitted)–that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (citation omitted) Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? (citations omitted) And finally, is the cause of action one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law? (citations omitted).

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[6] Although some courts in decisions subsequent to *Cort* have given more weight to some factors that others, the Ninth Circuit recently noted that "we still find the four-factor test helpful in determining whether a statute provides a private right of action." *See First Pac. Bancorp, Inc. v. Helfer*, 224 F.3rd 1117, 1122 (9th Cir. 2000).

Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975)

The first factor is plainly satisfied in applying the test to § 524. Section 524 creates a federal right in favor of debtors because they are especial and not merely incidental beneficiaries of the provisions of § 524.

In applying the second factor, this Court's decision in *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 100, S. Ct. 242, 62 L. Ed. 2d. 146 (1979), is instructive. In *Transamerica*, the Court held that a federal statute providing that a contract or instrument is "void" or the like manifests Congressional intent that the federal courts enforce the normal consequences of a contract or instrument being "void." *Transamerica* dealt with § 215 of the Investment Advisors Act of 1940. After concluding that the section was "intended to benefit the clients of investment advisers" and "the parties to advisory contracts as well," this Court concluded, "the statutory language itself fairly implies a right to specific and limited relief in a federal court":

> By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere. *At the very least* Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract. *But the legal consequences of voidness are typically not so limited.* A person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded *and to obtain restitution of consideration paid....* And this Court has previously recognized that a comparable provision, § 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b), confers a "right to rescind" a contract void under the criteria of the statute.... Moreover, the federal courts in general have viewed such language

> as implying an equitable cause of action for rescission or similar relief....
>
> For these reasons we conclude that when Congress declared in § 215 that certain contracts are void, it intended that *the customary legal incidents of voidness would follow, including the availability of a suit for rescission* or for an injunction against continued operation of the contract, *and for restitution*....

444 U.S. at 18-19 (emphasis added; citations omitted). Since "[a] reaffirmation agreement which does not comply fully with § 524 is void and unenforceable. . .,"[7] *Transamerica* supports the right of debtors harmed by the use of a void reaffirmation agreement to maintain an action against creditors such as AGFI who use such void agreements to collect on discharged debts. AGFI's claim that contempt is Bassett's exclusive remedy is contrary to Supreme Court precedent.

Although the Court in *Transamerica* did not find a private right of action for damages or other monetary relief implied in the Investment Advisors Act of 1940, that conclusion in *Transamerica* was based upon provisions within the Act that are not present in the Bankruptcy Code with respect to § 524. The Court noted that the Investment Advisors Act expressly provided administrative and judicial remedies for enforcing compliance with the act. 444 U.S. at 20. *Transamerica* does not, however, hold that *courts* should limit remedies available to aggrieved debtors, but rather that if *Congress* provides specific remedies for addressing violations of a statute, other remedies need not be implied. The Bankruptcy Code does not expressly provide specific remedies for violations of § 524. Therefore, that portion of the *Transamerica* decision that denies a private

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[7] *See e.g., In re Getzoff, 180 B.R. 572, 574 (B.A.P. 9th Cir. 1995). supra* at 574; *In re Turner*, 208 B.R. 434, 437 (Bankr. C.D. Ill. 1997).

right of action should not be applied to the case before this Court.

Indeed, had the Court of Appeals affirmed the BAP's finding that AGFI's form reaffirmation agreement violated § 524, it should have been expected that the court also would have found a private right of action for AGFI's conduct consistent with its holding in *First Pac. Bancorp v. Helfer*, 224 F.3d 1117 (9th Cir. 2000).[8] In *Helfer*, the Ninth Circuit stated:

> While we have not located any explicit statement of Congress's intent to create a remedy in the event the FDIC fails to comply with its statutorily mandated accounting and reporting practices and procedures, neither have we located any statement that Congress intended to deny such a remedy. The absence of a statement of intent to create a remedy does not necessarily mean that no remedy is available. Indeed, if that were the case, the Supreme Court would not have developed a test for an implied private right of action.

Helfer at 1124. After discussing and distinguishing several Supreme Court and Ninth Circuit decisions, the Ninth Circuit in *Helfer* held as follows:

> Applying the logic of *Transamerica Mortgage*, we can say that Congress would not create a right in the shareholders to access financial reports without a concomitant expectation that the information itself would be available

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[8] The same panel of the Ninth Circuit that heard this *Bassett* case also heard the *Walls v. Wells Fargo Bank* case on the same day. The decision in *Walls* is published at 276 F.3d 502. In that decision, the Ninth Circuit held that there is no private right of action under § 524 of the Bankruptcy Code. The issue of whether there is a private right of action under § 524 has never been addressed by this Court. That issue merits review by this Court based upon the importance of the issue to all debtors whose discharges are violated by aggressive creditors.

> to examine. To enforce the duties imposed by the statute, there must be an intended private right of action available to the shareholders. Consequently, under the facts presumed here, the second *Cort* factor is met.

Id. at 1125-26. Similar to the statute at issue in *Helfer*, there is no explicit statement of Congress's intent to create a private right of action for violations of § 524. Also, as in *Helfer*, it would make no sense for Congress to create a discharge for debtors without a concomitant expectation that creditors would have to refrain from actions in violation of the discharge. As in *Helfer*, there must be an intended private right of action available to debtors to enforce their § 524 rights against aggressive creditors such as AGFI.

The third *Cort* factor, whether a private right of action is consistent with the purposes of the legislation at issue was satisfied because Congress had not provided an explicit enforcement mechanism. As stated by the Ninth Circuit in *Helfer*:

> [W]here no enforcement mechanism is explicitly provided by Congress or an administrative agency, it is appropriate to infer that Congress did not intend to enact unenforceable requirements. Thus, it is fair to imply a private right of action from the statute at issue.

Helfer at 1126.

If this Court adopts the analysis articulated by the First Circuit in *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000) and finds that the Bankruptcy Code does provide an explicit mechanism for debtors to maintain actions for creditor violations of § 524 through § 105(a), then perhaps a private right of action need not be implied. However, if this Court does not agree with the First Circuit, then it should find a private right of action implied because, other than the

power given to the court to enforce provisions of the Bankruptcy Code under the first sentence of § 105(a), there is no explicit enforcement mechanism to assure compliance with the requirements of § 524.

As in *Helfer*, there is no issue with respect to the fourth *Cort* factor because there is no question that actions for creditor violations of § 524 are not traditionally relegated to state law. The analysis of the Court of Appeals in *Helfer* applies directly to the facts of this case, and under that analysis, the Court should find a private right of action implied under § 524.

Alternatively, § 105(a) explicitly authorizes the bankruptcy court to issue orders in two separate and distinct circumstances. The first sentence of § 105(a) authorizes the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." This authority was relied upon by the First Circuit in *Bessette*, *supra*. The First Circuit avoided the complex analysis required to determine whether § 524 implied a private right of action by finding that the debtor and the class she represented could maintain a direct action for the creditor's violation of § 524 under the authority of the first sentence of § 105(a). *See Bessette* at 444-46.

The second sentence of § 105(a) empowers the court to "[take] any action or [make] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." It is clear that this second grant of authority pertains to the contempt powers of the court. In denying debtors the right to maintain actions against creditors for violations of § 524, some courts have ignored that § 105(a) separates the authority of the court to enforce the provisions of the Bankruptcy Code from the authority to deal with contempt. The narrow reading of § 105(a) adopted by some courts and advocated by AGFI improperly reduces the authority Congress gave to bankruptcy courts.

Courts that improperly reject the authority given to bankruptcy courts under the first sentence of § 105(a) and limit the courts to entertaining actions for contempt,

compound their error and the resultant harm to debtors by refusing to find a private right of action implied under § 524. Creditors cannot have it both ways. Under the Ninth Circuit's *Helfer* analysis, the absence of an *explicit* enforcement mechanism for violations of § 524 should lead to the conclusion that a private right of action is implied. Whether the Court follows the First Circuit analysis in *Bessette* or holds that a private right of action is implied under § 524, the Court should provide a meaningful enforcement mechanism, including the ability to proceed by class action, for debtors to seek relief from creditors' violations of § 524. Ms. Bassett's Amended Complaint states claims for both violation of § 524 and civil contempt. Under the two grants of judicial authority provided in §105(a), both claims are proper and should be allowed to proceed.

III. THE TRUTH IN LENDING ACT APPLIES TO REAFFIRMATION AGREEMENTS THAT ARE SIGNED BY DEBTORS' COUNSEL AND THUS EVADE JUDICIAL REVIEW

The Bankruptcy Code specifically provides that reaffirmation agreements that are not signed by an attorney must be brought before the court for approval, but reaffirmation agreements signed by an attorney do not come before the court. Consequently, some reaffirmation agreements involve court proceedings and some do not.

Two lower court decisions, *In re Kamps*, 217 B.R. 836 (Bankr. C.D. Cal. 1998) and *In re Bruzzese*, 214 B.R. 444, 450-51 (E.D. N.Y. 1997), discuss in detail the reasons for requiring compliance with TILA for reaffirmation agreements that are not brought before the court for approval. After discussing the importance of TILA disclosures at length, the *Kamps* court even required TILA disclosures for court-approved reaffirmation agreements. In *Bruzzese*, the court correctly noted that when a reaffirmation agreement comes before the court for approval, the court can require whatever disclosures it deems appropriate to provide needed safeguards for reaffirming debtors. Conversely, when a

reaffirmation agreement is signed by an attorney and thus escapes judicial review, "there is no 'court proceeding' under [the TILA regulations and Official Staff Commentary]." *See Bruzzese* at 459.

The justification for excepting reaffirmation agreements, settlement agreements, and post-judgment agreements that involve court proceedings from TILA is that the scrutiny of the court is a substitute for the protections afforded to borrowers by the TILA requirements. The exception is not applicable to reaffirmation agreements, settlement agreements, or post-judgment agreements that never come before a court for scrutiny or approval. A careful reading of all the TILA regulations and Official Staff Commentary that relate to reaffirmation agreements leads to the single conclusion that only those agreements that come before the court for approval are exempt from TILA.

CONCLUSION

Based upon the conflicts with prior Court decisions and the importance of the issues involved to our most economically-vulnerable citizens, this Court should grant review of the Ninth Circuit opinion. Ms. Bassett urges the Court not to turn away from the real sufferings of low income citizens, but to enforce debtor protections in the Bankruptcy Code and reverse the Ninth Circuit opinion.

RESPECTFULLY SUBMITTED

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(Any footnotes trail end of each document)

No. 01-35001, No. 01-35058

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: DARLENE M. BASSETT,
Debtor.

AMERICAN GENERAL FINANCE, INC.,
Appellant,

v.

DARLENE M. BASSETT,
Appellee.

In re: DARLENE M. BASSETT,
Debtor.

DARLENE M. BASSETT,
Appellant,

v.

AMERICAN GENERAL FINANCE, INC.,
Appellee.

April 9, 2002, Filed

COUNSEL:
Frederick W. Schoepflin, of Keller Rohrback L.L.P., Seattle, Washington, argued the cause for Appellee and Cross-Appellant Darlene M. Bassett; Mark A. Griffin and Lynn Lincoln Sarko assisted on the brief.

Alan D. Smith of Perkins Coie L.L.P., Seattle, Washington, argued the cause for Appellant and Cross-Appellee American

General Finance, Inc.; Frederick B. Rivera and Adriana Rodriguez assisted on the brief.

JUDGES:
Before: Alex Kozinski, Pamela Ann Rymer and Barry G. Silverman, Circuit Judges. Opinion by Judge Kozinski.

OPINION BY:
Alex Kozinski

OPINION:

KOZINSKI, Circuit Judge:

Darlene Bassett bought two chairs and two ottomans, and financed the purchase with a secured loan from American General Finance, Inc. (Finance). Months later, Bassett filed a voluntary Chapter 7 bankruptcy petition. Before receiving a discharge, Bassett signed a reaffirmation agreement with Finance. Bassett kept up with her payments to Finance for a few months but eventually stopped. Finance sent a series of letters, first friendly and later pointed, asking to be paid. Bassett responded by moving to reopen her bankruptcy so that she could bring this putative class action lawsuit. Bassett argues that the reaffirmation agreement she signed is unenforceable and that Finance's collection letters were therefore illegal. Under a number of theories, she seeks damages and a declaration that the reaffirmation agreement is unenforceable.

The bankruptcy court concluded that the agreement is enforceable and granted Finance's motion for judgment on the pleadings. The Bankruptcy Appellate Panel reversed, concluding that the reaffirmation agreement is not enforceable and that Finance's attempted collection of the debt violated Bassett's discharge. The BAP remanded so that Bassett could proceed with claims for civil contempt and violation of the automatic bankruptcy stay. See *Bassett v. Am. Gen. Fin., Inc. (In re Bassett), 255 B.R. 747, 760 (B.A.P. 9th Cir. 2000)*. Finance appeals and Bassett cross-appeals the BAP's affirmance of the dismissal of a implied

cause of action under *11 U.S.C. § 524*, and of her state law and Truth in Lending Act claims.

1. Bassett argues that the reaffirmation agreement is unenforceable because it fails to comply with *11 U.S.C. § 524*(c)(2)(A), which requires the agreement to have a "clear and conspicuous" statement that "advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court." *11 U.S.C. § 524*(c)(2)(A). Bassett does not dispute that the agreement contains this "right-to-rescind" statement; she argues that the statement is not "clear and conspicuous."

The bankruptcy code doesn't define" clear and conspicuous." Other courts considering this question have defined the term by borrowing the state law definition of "conspicuous" found in section 1-201(10) of the Uniform Commercial Code. See, e.g., *In re Noble, 182 B.R. 854, 858 (Bankr. W.D. Wash. 1995); In re Roberts, 154 B.R. 967, 969-70 (Bankr. D. Neb. 1993)*. We see no reason to depart. When a federal statute leaves terms undefined or otherwise has a "gap, "we often borrow from state law in creating a federal common law rule. See *PM Group Life Ins. Co. v. W. Growers Assurance Trust, 953 F.2d 543, 546 (9th Cir. 1992); De Sylva v. Ballentine, 351 U.S. 570, 580-81, 100 L. Ed. 1415, 76 S. Ct. 974 (1956)* (borrowing a state law definition of "children" for purposes of the Copyright Act). The UCC's definition of "conspicuous" is an obvious choice, because it, like section 524(c)(2), is concerned with making contract language readily accessible to unsophisticated parties.

Hence,

[a] term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: Non-Negotiable Bill of Lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is" conspicuous" or not is for decision by the court.

U.C.C. § 1-201(10), 1 U.L.A. 64 (1977).

The BAP also borrowed the UCC's definition of "conspicuous," but looked to caselaw from the District of South Carolina to interpret it. See *Bassett, 255 B.R. at 751-52* (citing *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1038 (D.S.C. 1993)).* It needn't have reached quite so far. Interpreting Nevada's version of the UCC, we held that a term is conspicuous if "a reasonable person in the buyer's position would not have been surprised to find the [term] in the contract." *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp., 890 F.2d 108, 114 (9th Cir. 1989).*

We decide conspicuousness as a matter of law. This is not because judges are experts at graphic design, but because subjecting conspicuousness to fact-finding would introduce too much uncertainty into the drafting process. See *Smith v. Check-N-Go of Illinois, Inc., 200 F.3d 511, 515 (7th Cir. 1999)* ("No matter what a lender did, a borrower could say that to his eyes the combination of color, typeface, spacing, size, style, underlining, capitalization, border, and placement ...emphasized one disclosure over another."); U.C.C. § 1-201(10).

Bassett's reaffirmation agreement is two pages long. Roughly three-fourths of the top of the first page contains instructions and spaces for such information as Bassett's name and the loan's principal amount and interest rate. Much of this is white space. Just three sentences appear below these blanks:

The parties understand that this agreement is purely voluntary and that the debtor may rescind the agreement at any time prior to discharge or within 60 days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the creditor. Rescission of the Reaffirmation Agreement shall be considered default under the terms and conditions of the Installment Agreement referred to above.

THE DEBTOR UNDERSTANDS THAT THIS AGREEMENT IS NOT REQUIRED UNDER THE UNITED STATES BANKRUPTCY CODE TITLE 11 U.S.C. AND NOT REQUIRED UNDER NON BANKRUPTCY LAW OR ANY AGREEMENT NOT IN ACCORDANCE WITH THE PROVISION OF *11 U.S.C. SECTION 524*(c).

The signature line appears just below, as the very last item in the agreement proper.

The second page of the reaffirmation agreement contains a space for the attorney's declaration required by *11 U.S.C. § 524*(c)(3), the motion for court approval and the court order. The attorney declaration affirms that the debtor is fully advised of the agreement's consequences, and that the agreement does not impose an undue burden on the debtor.

The BAP held that Finance's right-to-rescind statement is not "conspicuous" because it is in lower case, and near a sentence that is in capitals. This, the panel concluded, "has the effect of de-emphasizing the right-to-rescind language." *Bassett, 255 B.R. at 752.* Additionally, the BAP found that the right-to-rescind statement is "rendered visually less prominent" because it is next to a sentence stating that the rescission constitutes a default. Id. The BAP insisted that it was not making a hard-and-fast rule about whether section 524(c)(2) requires any particular formatting; instead, "on this particular form, the combined effect of printing the right-to-rescind language in lower-case type, of including unnecessary language in the same paragraph, and of printing nearby language in upper-case type renders the present reaffirmation agreement unenforceable." Id.

None of these factors justify holding that the right-torescind statement is not clear and conspicuous. Including "unnecessary language" in the same paragraph as the right-to rescind statement has only a minor impact. The "unnecessary language" the BAP identifies is a single sentence that takes up about two lines of text. While it's possible that the statement would be marginally more visible with an entire paragraph to itself, the encroachment of a few extra words hardly matters.

The BAP was troubled that the right-to-rescind statement is in lower case, but there is nothing magical about capitals. True, the UCC specifies that "[a] printed heading in capitals" is normally conspicuous. U.C.C. § 1-201(10) (emphasis added). This has given rise to the canard that all language in capitals is automatically conspicuous, and the fallacy that language not in capitals isn't conspicuous. One leading sales law treatise goes farther and advises readers to use" bold-face capitals of a contrasting color" to be conspicuous. 1 James J. White & Robert S. Summers, Uniform Commercial Code § 12-5 at 637 (4th ed. 1995). The use of capitals as a talisman of conspicuousness has survived intact despite decades of improved literacy and technology. Even some web page "click-through" agreements have clauses written in capitals, though there are better ways of making text stand out in a web browser window. See, e.g., *Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585, 588-89 (S.D.N.Y. 2001).*

Lawyers who think their caps lock keys are instant "make conspicuous" buttons are deluded. In determining whether a term is conspicuous, we look at more than formatting. A term that appears in capitals can still be inconspicuous if it is hidden on the back of a contract in small type. See, e.g., *Sierra Diesel, 890 F.2d at 114.* Terms that are in capitals but also appear in hard-to-read type may flunk the conspicuousness test. See, e.g., id.; *Lupa v. Jock's, 131 Misc. 2d 536, 500 N.Y.S. 2d 962, 965 (N.Y. City Ct. 1986).* A sentence in capitals, buried deep within a long paragraph in capitals will probably not be deemed conspicuous. Formatting does matter, but conspicuousness ultimately turns on the likelihood that a reasonable person would actually see a term in an agreement. Thus, it is entirely possible for text to be conspicuous without being in capitals.

The BAP suggested that the right-to-rescind statement is inconspicuous because a nearby sentence in capitals" de-emphasizes" it. Formatting does have the potential to distract: A bold, red, 24-point gothic-font sentence etched holographically onto a page might steal the spotlight from neighboring sentences. Some purists insist that using emphasis" as a guarantee that some portion of what one has

written is really worth attending to is a miserable confession that the rest is negligible." H.W. Fowler, A Dictionary of Modern English Usage 305-06 (Crown Publishers 1983). But this problem arises only when formatting highlights a sentence by making it stand out from a surrounding sea of text. When an agreement is three sentences long, this isn't an issue.

Finance's reaffirmation agreement demonstrates the shortcomings of any conspicuousness test that turns on contrasting formatting. Section 524 requires two "clear and conspicuous" statements. Aside from the right-to-rescind statement, the agreement must also have a "clear and conspicuous "notification to the debtor that the law does not require him to enter into a rescission agreement. See *11 U.S.C. § 524*(c)(2)(B). Finance's form puts this notification in capitals. If Finance had also put the right-to-rescind statement in capitals, that would have left a single sentence in lower case. Normally, statements in capitals stand out; but if every sentence except one is in capitals, then only that (supposedly inconspicuous) sentence contrasts with the others. Of course, had Finance deleted that odd lower-case sentence, the entire agreement would have been in capitals.

Brevity promotes conspicuousness. Bassett's rescission agreement takes up significantly less than one side of a page. The right-to-rescind statement is the first sentence in the agreement, making it even more conspicuous--even the least attentive reader is likely to see it. No aspect of the formatting or appearance of the statement makes it less visible or difficult to read. A reasonable person "would not have been surprised to find" the agreement's right-to-rescind statement. *Sierra Diesel, 890 F.2d at 114.*

2. Bassett also argues that the reaffirmation agreement is unenforceable because it contains a misleading (and hence not "clear") statement. Bassett faults the agreement's second sentence: "Rescission of the Reaffirmation Agreement shall be considered default under the terms and conditions of the Installment Agreement referred to above."

While this sentence is not strictly accurate in all cases--rescission would only lead to a default if the debtor was in

default at the time of bankruptcy–it accurately described the consequences Bassett faced, because she was in default when she applied for bankruptcy. Even if she hadn't been, Bassett was not forced to rely solely on the agreement's statement of the law: The attorney declaration accompanying the reaffirmation agreement states that the attorney had "fully advised the debtor ...of the legal effect and consequences of default under [the reaffirmation] agreement." Because she received this independent legal advice, she cannot argue that the reaffirmation agreement is misleading.

3. We conclude that the right-to-rescind statement is clear and conspicuous as required by *11 U.S.C. § 524*, and that Bassett's reaffirmation agreement is therefore enforceable. Bassett's claims for violation of the post-discharge injunction, civil contempt, violation of the Washington Consumer Protection Act, unjust enrichment, and violation of the Truth in Lending Act all require a finding that the reaffirmation agreement is unenforceable. Thus, they all fail.

4. Bassett also seeks relief under *11 U.S.C. § 362*(h) for willful violations of the automatic bankruptcy stay. According to Bassett's complaint, Finance "made regular and repeated telephone calls to Ms. Bassett's home during the pendency of Ms. Basset's [sic] bankruptcy proceedings to demand repayment of its loans." Compl. at P 23.

Bassett did not file a claim for violation of the stay while her case was pending in bankruptcy court. Instead, she moved to reopen her bankruptcy so that she could file a class action complaint for violation of the post discharge order. Her motion to reopen did not mention any plans to file a claim for willful violation of the automatic stay, and the order reopening her case did not reopen it for that purpose.

The bankruptcy court's order granting Finance's motion for judgment on the pleadings does not explain why the bankruptcy court dismissed Bassett's claim for willful violations of the automatic bankruptcy stay. It is possible that the dismissal was based on the fact that the issue was not properly before the court, not having been within the scope of the bankruptcy court's order reopening the proceedings. See *Donaldson v. Bernstein, 104 F.3d 547, 553 (3d Cir.*

1997). If so, the bankruptcy court would have been well within its discretion. However, because the bankruptcy court did not explain the basis of its order, we are unable to determine how, or by what standard, to review that dismissal.

It does seem clear that Bassett did not seek, and the bankruptcy court did not grant, reopening as to this claim. This may impact either the bankruptcy court's discretion on reopening, or its jurisdiction to proceed, or both. We leave these matters for the bankruptcy court's consideration on remand.

***

We reverse the BAP's determination that the reaffirmation agreement is unenforceable; reverse the BAP's reversal of the dismissal of Bassett's claims for civil contempt; affirm the BAP's reversal of the dismissal of Bassett's claim for violation of the automatic stay; and affirm the BAP's affirmance of the dismissal of Bassett's damage claim under section 524, Bassett's state law claims, and Bassett's Truth in Lending Act claims. Costs for the appeal will be taxed against Bassett, and costs for the cross-appeal will be taxed against Finance.

AFFIRMED in part; REVERSED in part; REMANDED.

BAP No. WW-00-1071-CCaK

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE NINTH CIRCUIT

In re DARLENE M. BASSETT, Debtor.

DARLENE M. BASSETT,
Appellant,

v.

AMERICAN GENERAL FINANCE, INC.,
Appellee.

October 13, 2000 Argued and Submitted,
Seattle, Washington

November 17, 2000, Filed

COUNSEL:
Frederick W. Schoepflin KELLER, ROHRBACK, LLP, Seattle, WA, Attorney for Darlene M. Bassett.

Frederick B. Rivera, PERKINS COIE, Seattle, WA, Attorney for American General Finance, Inc.

JUDGES:
Before: CARLSON, n1 CARROLL, n2 and KLEIN, Bankruptcy Judges.

OPINION BY:
CARLSON

OPINION:
CARLSON, Bankruptcy Judge:

Debtor brought a class action asserting a private right of action for violation of the discharge injunction based on a creditor's collection of debts pursuant to an invalid reaffirmation agreement. The bankruptcy court found that

the reaffirmation agreement was valid and dismissed the action with prejudice. We affirm in part and reverse in part. We hold that the reaffirmation agreement was invalid, that there is no private right of action for violation of section *11 U.S.C. § 524*, and that Debtor may enforce the discharge injunction through civil contempt proceedings.

FACTS

Debtor Darlene Bassett filed a chapter 7 case on May 2, 1997. Among her scheduled debts was a secured purchase-money debt to American General Finance, Inc. (AGF) in the amount of $ 2,103. At a continued meeting of creditors at which Debtor's counsel did not appear, Debtor signed a reaffirmation agreement prepared by AGF. Debtor's counsel later signed the reaffirmation agreement, certifying that the attorney had fully advised Debtor regarding the agreement, that Debtor's decision to sign the agreement was informed and voluntary, and that the agreement did not impose an undue hardship on Debtor. AGF filed the reaffirmation agreement with the court, Debtor received a discharge, and the chapter 7 case was closed. Debtor did not attempt to rescind the reaffirmation agreement under § 524(c)(4).

Debtor made the monthly payments called for in the reaffirmation agreement through February 1999. After she failed to make the March and April 1999 payments, AGF allegedly threatened to accelerate the loan and made numerous calls to Debtor attempting to collect the reaffirmed debt.

In November 1999, Debtor filed a class action adversary proceeding in the bankruptcy court alleging, inter alia, that AGF violated the discharge injunction by collecting a discharged debt pursuant to a reaffirmation agreement that does not meet the requirements of § 524(c)

Debtor alleged that the particular form of the reaffirmation agreement used by AGF caused the agreement to be void and unenforceable for two reasons. First, the provision advising Debtor of her right to rescind the agreement was not "clear and conspicuous" as required by § 524(c)(2). Second, the agreement impermissibly discouraged

Debtor from exercising her right to rescind by stating "rescission of the Reaffirmation Agreement shall be considered default under the terms and conditions of the Installment Agreement referred to above.

The complaint asserts the following six separate claims for relief based on AGF's use of this reaffirmation agreement:

(1) violation of the discharge injunction of § 524;

(2) violation of the automatic stay;

(3) civil contempt for violation of the discharge injunction;

(4) violation of the Washington Consumer Protection Act;

(5) unjust enrichment and constructive trust; and

(6) violation of the Truth in Lending Act.

Debtor seeks injunctive, declarative, and monetary relief against AGF on behalf of all debtors affected by AGF's use of the improper reaffirmation agreement.

The bankruptcy court granted AGF's motion for judgment on the pleadings, determining that the reaffirmation agreement satisfied all statutory requirements regarding form and was fully enforceable under § 524(c). As an alternative basis for its decision, the court ruled that any defect in the form of the agreement was cured by the certification by Debtor's attorney that she advised Debtor of her rights.

The court entered a judgment dismissing the action with prejudice without addressing Plaintiff's request for class certification. Debtor filed a timely notice of appeal.

ISSUES ON APPEAL

(1) Does the reaffirmation agreement meet the requirements of § 524(c)?

(2) Is there a private right of action for violation of § 524?

(3) Does Debtor state a valid claim for civil contempt for violation of the discharge injunction?

(4) Does Debtor state a valid claim for violation of the automatic stay?

(5) Are Debtor's state law claims preempted?

(6) Does Debtor state a valid claim under the Truth in Lending Act?

STANDARD OF REVIEW

The bankruptcy court decision granting AGF's motion for judgment on the pleadings is subject to de novo review. *Cohen v. Stratosphere Corp., 115 F.3d 695, 700 (9th Cir. 1997).* In exercising such review, we accept as true all material allegations in the complaint and construe them in a light most favorable to Debtor. *NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).*

DISCUSSION

I

Validity of Reaffirmation Agreement

Debtor asserts that the AGF reaffirmation agreement is unenforceable, because the language advising her that she may rescind the reaffirmation agreement is not "clear and conspicuous." The relevant portion of the reaffirmation agreement appears as follows:

> The parties understand that this agreement is purely voluntary and that the debtor may rescind the agreement at any time prior to discharge or within 60 days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the creditor. Rescission of the Reaffirmation Agreement shall be considered default under the terms and conditions of the Installment Agreement referred to above.
>
> THE DEBTOR UNDERSTANDS THAT THIS AGREEMENT IS NOT REQUIRED UNDER THE UNITED STATES BANKRUPTCY CODE TITLE 11 U.S.C. AND NOT REQUIRED UNDER NON BANKRUPTCY LAW OR ANY

AGREEMENT NOT IN ACCORDANCE WITH THE PROVISION OF *11 U.S.C. SECTION 524*(C).

Section 524(c)(2)(A) mandates that a reaffirmation agreement contain "a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim." *11 U.S.C.,§ 524*(c)(2)(A).

Whether the right-to-rescind language is clear and conspicuous is a question of law for the court to decide. *In re Roberts, 154 B.R. 967, 970 (Bankr. D. Neb. 1993).*

A reaffirmation agreement that does not comply fully with § 524 is void and unenforceable. *Republic Bank of Cal., N.A. v. Getzoff (In re Getzoff), 180 B.R. 572, 574 (9th Cir. BAP 1995).* Accord, *Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 2000 WL 1585090* at *3 (1st Cir. 2000)

To determine whether language is clear and conspicuous, bankruptcy courts draw upon the definition of "conspicuous" found in the Uniform Commercial Code. See *In re Noble, 182 B.R. 854, 858 (Bankr. W.D. Wash. 1995); Roberts, 154 B.R. at 969-70.* Section 1-201(10) of the Uniform Commercial Code provides:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

In determining whether language disclaiming implied warranties was conspicuous, one court identified the following relevant factors:

(1) the color of print in which the purported disclaimer appears; (2) the style of print in which the disclaimer is

written; (3) the size of the disclaiming language, particularly in relation to other print in the document; (4) the location of the disclaimer in the contract; (5) the appearance of the term "merchantability" with respect to color, style, size, and type of print in the disclaimer clause; and (6) the status of the parties contesting the validity of the disclaimer, namely whether they be consumers or commercially sophisticated entities. While these factors lend aid to the determination of what constitutes "conspicuous" language, the court believes that no single factor is dispositive nor are these enumerated factors exhaustive of all the criteria that can be used in examining a disclaimer.

Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1038 (D.S.C. 1993), aff'd, *46 F.3d 1125 (4th Cir. 1995)*

The right-to-rescind language in the AGF reaffirmation agreement is not conspicuous. Its language is printed in lowercase letters, while nearby language is printed in upper-case letters. This has the effect of de-emphasizing the right-to-rescind language, an effect directly contrary to what § 524(c) (2) (A) requires. *Roberts, 154 B.R. at 970; Noble, 182 B.R. at 858.* The right-to-rescind language is also rendered visually less prominent by the addition of language stating that rescission constitutes a default.

We need not address whether the warnings required under § 524(c)(2) must always be printed in bold or upper-case letters. On this particular form, the combined effect of printing the right-to-rescind language in lower-case type, of including unnecessary language in the same paragraph, and of printing nearby language in upper-case type renders the present reaffirmation agreement unenforceable. n3

The bankruptcy court held that any infirmities in the reaffirmation agreement were cured by the fact that Debtor's counsel signed the following certification:

THIS AGREEMENT REPRESENTS A FULLY INFORMED AND VOLUNTARY AGREEMENT THAT DOES NOT IMPOSE AN UNDUE HARDSHIP ON THE DEBTOR OR ANY DEPENDENT OF THE DEBTOR. FURTHER, AS ATTORNEY

FOR THE DEBTOR, I HAVE FULLY ADVISED THE DEBTOR OF THE LEGAL EFFECT AND CONSEQUENCES OF SUCH AGREEMENT AND OF THE LEGAL EFFECT AND CONSEQUENCES OF DEFAULT UNDER SUCH AGREEMENT.

AGF argues that a debtor's attorney can cure a creditor's defective form: "clarity and conspicuity must each be considered under the totality of the circumstances. In this case, those circumstances include Bassett's representation by counsel, and a certification by her counsel, that Bassett was fully informed." We think this argument proves too much.

We agree with Debtor's argument that a debtor's attorney cannot cure a defective form: "Congress did not say that an agreement passes muster when it contains either (1) the prescribed conspicuous notices that affirmation is not required and may be rescinded under Code § 524(c)(2)(2) the attorney's declaration under § 524(c)(3); Congress plainly required both."

The structure of § 524(c) suggests that attorney certification does not in any way vitiate the requirement that the right-to-rescind language be conspicuous. If Congress had meant that attorney certification was to be a sufficient safeguard, it would not have made the conspicuous statements prescribed by § 524(c)(2) independent essential elements of an enforceable reaffirmation agreement. Under the statute as written, attorney certification operates only to obviate judicial approval of a reaffirmation agreement as not imposing undue hardship and as being in the best interest of the debtor. *11 U.S.C. § 524*(c)(6).

Congress plainly did not choose to rely solely upon debtor's counsel to advise the debtor of the right to rescind a reaffirmation agreement. Rather, it adopted a belt-and-suspenders approach in which conspicuous warnings in the reaffirmation agreement constitute an important additional safeguard. We view this scheme as remedial in nature. In view of the creditor's power to control the form of the reaffirmation agreement it uses, the practical, efficient way to enforce the form requirements in this remedial scheme is to allocate to the creditor all of the risk of noncompliance. It is

therefore appropriate to construe the statutory form requirements strictly, even where debtor is represented by counsel.

A second reason it is irrelevant that Debtor received advice of counsel is that the test for determining whether the right-to-rescind language is conspicuous is an objective one. The Uniform Commercial Code states that language is conspicuous if "a *reasonable* person against whom it is to operate ought to have noticed it." U.C.C. § 1-201(10) (emphasis added). The factors identified in Myrtle Beach Pipeline for determining whether language is conspicuous also emphasize the manner in which the language is printed, not the non-drafting party's subjective understanding. *Myrtle Beach Pipeline, 843 F. Supp. at 1038;* see also *Getzoff, 180 B.R. at 575* (protections of § 524 not limited to unsophisticated debtors). A creditor acts at its peril when it uses a reaffirmation agreement that does not adhere fully to those statutory form requirements.

In short, the statutory requirements of form are strictly construed. A creditor acts at its peril when it uses a reaffirmation agreement that does not adhere fully to those statutory form requirements, regardless of whether the debtor is represented by counsel.

II

Private Right of Action

The court dismissed Debtor's first claim for relief, which asserts a private right of action under § 524, on the implicit basis that it was mooted by the determination that the reaffirmation agreement satisfied the requirements of § 524.

Although the bankruptcy court did not focus on whether there is a private right of action under § 524, we must address that question, because AGF raised the argument below and it is our duty to affirm on any ground presented in the record, e.g., *Dittman v. California, 191 F.3d 1020, 1027 n.3 (9th Cir. 1999)*, cert. denied, *530 U.S. 1261, 147 L. Ed. 2d 982, 120 S. Ct. 2717 (2000)*. In recognition of this obligation, the parties have extensively briefed and argued before us the merits of the private-right-of-action question.

As § 524 does not expressly authorize any action for enforcement of its provisions, we look to the case law addressing the circumstances in which a private right of action may be implied. The Supreme Court enunciated the following test in Cort v. Ash:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"–that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975) (citations omitted)

The courts are split as to whether a debtor may assert an implied private right of action for violation of § 524.

The majority of published decisions hold that § 524 does not create a private right of action. *Walls v. Wells Fargo Bank, N.A., 255 B.R. 38, 2000 WL 1584576* at *4-6 (E.D. Cal. 2000); *Kibler v. WFS Fin., Inc., B.R. , 2000 U.S. Dist. LEXIS 19131, 2000 WL 1470655* at *4-8 (C.D. Cal. Sept. 13, 2000); *Peterson v. Wells Fargo Bank, N.A., 2000 U.S. Dist. LEXIS 18372, 2000 WL 1225788* at *4-6 (E.D. Cal. Aug. 17, 2000); *Cox v. Zale Delaware, Inc., 242 B.R. 444, 447-49 (N.D. Ill. 1999); Pereira v. First N. Am. Nat'l Bank, 223 B.R. 28, 30-31 (N.D. Ga. 1998); Sullivan v. All States Lumber. Inc. (In re Sullivan), 90 B.R. 307, 308-09 (M.D. Tenn. 1988); Reyes v. FCC Nat'l Bank (In re Reyes), 238 B.R. 507, 510-12 (Bankr. D.R.I. 1999); Costa v. Welch (In re Costa), 172 B.R. 954, 965-66 (Bankr. E.D. Cal. 1994).*

A minority of decisions recognize an implied private right of action under § 524. *Molloy v. Primus Auto. Fin. Servs., 247 B.R. 804, 815-20 (C.D. Cal. 2000); Malone v. Norwest*

Fin. Cal., Inc., 245 B.R. 389, 395-98 (E.D. Cal. 2000); Rogers v. NationsCredit Fin. Servs. Corp., 233 B.R. 98, 108-09 (N.D. Cal. 1999).

The First Circuit, when presented the question, exercised its discretion to decline to "jump into the fray" in light of the unquestioned availability of a contempt remedy for violations of the discharge injunction. *Bessette, 230 F.3d at 444, 2000 WL 1585090* at *3 (1st Cir. 2000) . Although we agree with the First Circuit about the availability of contempt as a method for enforcing the discharge injunction, we will deal with the question that the parties have presented to us.

The first and last of the Cort factors are plainly satisfied. Debtors are unquestionably members of the class for whom the protections of § 524 were enacted. *Walls, 2000 WL 1469029* at *5; *Kibler, 2000 U.S. Dist. LEXIS 19131, 2000 WL 1470655* at *5; *Malone, 245 B.R. at 396.* Because bankruptcy is solely a creature of federal law, recognition of a private right of action for violation of the bankruptcy discharge also does not invade an area traditionally reserved for state law. Id.

The cases that decline to recognize a private right of action under § 524 rely upon the second and third Cort factors. They note that civil contempt is the traditional remedy for violation of the discharge injunction, and that Congress evinced its intent not to authorize a private right of action under § 524 when it created a right of action for violation of the automatic stay, but did not include a similar provision in § 524. E.g., *Walls, 2000 WL 1469029* at *5-6; *Kibler, 2000 U.S. Dist. LEXIS 19131, 2000 WL 1470655* at *5-8; *Pereira, 223 B.R. at 30; Costa, 172 B.R. at 966.*

The minority of cases finding an implied right of action rely on perceived limits in the efficacy of the contempt remedy, policy considerations favoring rigorous enforcement of the bankruptcy discharge, and the power of the bankruptcy court under *11 U.S.C. § 105* to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." E.g., *Malone, 245 B.R. at 394-98; Rogers, 233 B.R. at 108-09.*

The majority line of cases holding there is no private right of action for violation of § 524 is more persuasive.

Contempt proceedings are the traditional method for addressing a violation of the discharge injunction. *Walls, 2000 WL 1469029* at *5; *Kibler, 2000 U.S. Dist. LEXIS 19131, 2000 WL 1470655* at *5; *Peterson, 2000 WL 1225788* at *5; *Pereira, 223 B.R. at 30; Costa, 172 B.R. at 966.* Through civil contempt proceedings, an aggrieved debtor can obtain compensatory damages, attorneys fees, and the offending creditor's compliance with the discharge injunction. n4 *United States v. United Mine Workers, 330 U.S. 258, 304, 91 L. Ed. 884, 67 S. Ct. 677 (1947); Bessette, 230 F.3d 439; Crystal Palace Gambling Hall, Inc. v. Mark Twain Indus., Inc. (In re Crystal Palace Gambling Hall, Inc.), 817 F.2d 1361, 1366-67 (9th Cir. 1987); Peterson, 2000 WL 1225788* at *5-6; *Cox, 242 B.R. at 448-49; Costa, 172 B.R. at 964-65.* Douglas Rendleman, Compensatory Contempt: Plaintiff's Remedy When Defendant Violates an Injunction, *1980 U. ILL. L.F. 971.*

This tradition of enforcing the discharge injunction through civil contempt proceedings militates against the implication of a private damage remedy in two ways. It lessens the need for a damage remedy. It also suggests that Congress would expect the discharge injunction to be enforced in this traditional manner unless it specified otherwise. *Costa, 172 B.R. at 966.*

Congress' express creation of a private damage action for violation of the automatic stay suggests that Congress acted deliberately in failing to specify a similar remedy for violation of the discharge injunction. The automatic stay of *11 U.S.C. § 362* and the discharge injunction of § 524 are closely related. The automatic stay protects the debtor against collection activities at the outset of the case. When a discharge is entered, the automatic stay ceases to protect the debtor, and the debtor receives similar protections through the discharge injunction.

Both § 362 and § 524 were enacted in tandem in 1978 and then amended in tandem in 1984. A new provision was added to § 362 in 1984 authorizing an individual debtor to recover

compensatory and punitive damages for willful violation of the automatic stay. n5 Congress, while making other adjustments to § 524 in 1984, did not add a damage remedy to that section.

The close relationship of the two statutes, the fact that they were both amended at the same time, and the fact that Congress authorized a damage action under § 362, suggest that Congress did not intend to permit a damage action under § 524. *Walls, 2000 WL 1469029* at *6; *Kibler, 2000 U.S. Dist. LEXIS 19131, 2000 WL 1470655* at *7-8; *Peterson, 2000 WL 1225788* at *5; *242 B.R. at 447-48; Costa, 172 B.R. at 966.*

Congress' repeated attention to § 524 also suggests that its failure to authorize a private damage action for violation of that statute was not a mistake. Congress has amended § 524 three times since that statute was enacted in 1978. n6 These amendments delicately balance the concerns of debtors' advocates, who wish to restrict reaffirmation agreements so that debtors do not foolishly give up the benefits of the discharge, and the concerns of creditor groups, who urge that debtors should be encouraged to take responsibility for their debts and that reaffirmation agreements should not be discouraged. Under § 524, reaffirmation agreements are permitted but circumscribed. The history of controversy surrounding reaffirmation agreements suggests that Congress did not simply forget to consider creating a damage action under § 524 when it created such a remedy under § 362. The history of not fully vindicating either side in the reaffirmation debate is consistent with limiting debtors to the remedies available through civil contempt proceedings.

Both Debtor and the Malone decision rely heavily upon *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979)*, in finding an implied private right of action under § 524. *Malone, 245 B.R. at 397.* We agree that Transamerica Mortgage is particularly pertinent to the question before us. We conclude, however, that it counsels against recognizing a private right of action under § 524.

In Transamerica Mortgage, a private party attempted to bring an action under the Investment Advisers Act of 1940. That Act expressly authorizes the government to bring civil and criminal actions, but does not expressly authorize private actions. The Act also provides that any advisory contract violating the Act is void. The Court held that the statute "implies a right to specific and limited relief in federal court." Id. at 18. By declaring certain contracts void, the Act "necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." Id. Thus, a private party can bring an action for rescission, restitution, and injunctive relief against further enforcement of the contract. Id. at 19.

The Court declined, however, to recognize a private right of action "for damages or other monetary relief." Id. Because previously enacted securities laws expressly authorized private damage suits, but the Investment Advisers Act did not, the Court found that Congress did not intend to permit such actions under that Act. Id. at 21. The Court expressly rejected the argument that a private right of action should be recognized because it would further the general purpose of the Act, where other evidence indicated that Congress did not intend to create such a right.

Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf. The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end.

Id. at 24 (citations omitted). The Court also stated that the right to bring an action for rescission should be narrowly construed to preclude any form of monetary damages, because 'such relief could provide by indirection the equivalent of a private damages remedy that we have concluded Congress did not confer." Id. at 24 n.14.

The lesson of Transamerica Mortgage is that the courts should provide aggrieved debtors "specific and limited"

means to enforce their rights under § 524 of the Bankruptcy Code. The courts have long done so by permitting debtors to enforce the discharge injunction of § 524 through civil contempt proceedings. As noted above, aggrieved debtors may obtain compensatory damages, attorneys fees, and compliance with the discharge injunction in that manner. Transamerica Mortgage suggests with equal force that debtors should not be afforded the broader relief of a private right of action for damages. Congress' creation of such a right under § 362 but not under § 524 suggests even more strongly than the legislative actions under consideration in Transamerica Mortgage that Congress did not intend to authorize damage actions under § 524.

Section 105 does not provide the basis for a private right of action. n7 First, if Congress believed § 105 authorized a private damage action for a violation of the Bankruptcy Code, it would have had little need to create a private right of action under § 362(h) for violation of the automatic stay. Second, § 105 may not be relied upon to alter the substantive rights fixed in the Bankruptcy Code. *Kibler, 2000 U.S. Dist. LEXIS 19131, 2000 WL 1470655* at *6. *Molloy, 247 B.R. at 818 n.12; Costa, 172 B.R. at 965.*

Where the evidence indicates that Congress deliberately declined to authorize a private right of action for violation of § 524, § 105 should not be used to effect a contrary result.

The bankruptcy court did not err in dismissing Debtor's first claim for relief.

III

Contempt

Debtor's third claim for relief asserts that AGF should be held in civil contempt for violating the discharge injunction by collecting a discharged debt pursuant to an invalid reaffirmation agreement. The bankruptcy court dismissed this claim on the basis that the reaffirmation agreement was fully enforceable.

Debtor argues that because the bankruptcy court erred in determining the reaffirmation agreement to be valid, it also erred in dismissing the contempt claim. We agree.

If a reaffirmation agreement does not satisfy the requirement of § 524(c), it is void. *Getzoff, 180 B.R. at 574.*

Collection of a discharged debt pursuant to an invalid reaffirmation agreement violates the discharge injunction. *Bessette, 230 F.3d 439, 2000 WL 1585090* at *3; *Wiley v. Mason (In re Wiley), 224 B.R. 58, 65 (Bankr. N.D. Ill. 1988).*

The bankruptcy court may use its contempt power to enforce the discharge injunction. E,g, *Bessette, 230 F.3d 439, 2000 WL 1585090* at *4, *Hardy v. United States (In re Hardy), 97 F.3d 1384, 1389-90 (11th Cir. 1996); Caldwell v. United Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284-85 (9th Cir. 1996).*

AGF contends that Debtor does not state a claim for civil contempt, even if the reaffirmation agreement is not enforceable, because its good faith compliance with the law is a defense to a contempt motion. This argument is unpersuasive.

The courts have employed an objective test in determining whether an injunction should be enforced via the contempt power. "The focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue." *Hardy, 97 F.3d at 1390* (quoting *Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1516 (11th Cir. 1990)).* Debtor's complaint alleged sufficient facts to state a claim under this test.

The bankruptcy court has broad discretion in determining whether to issue an order to show cause re contempt and in fashioning a remedy for violation of the discharge injunction. *Costa, 172 B.R. at 963-64.* The bankruptcy court did not, however, exercise such discretion in dismissing Debtor's civil contempt claim. Rather, the court dismissed the claim on the

faulty premise that the reaffirmation agreement was fully enforceable.

The bankruptcy court erred in dismissing Debtor's third claim for relief.

IV

Violation of Automatic Stay

Debtor's second claim for relief asserts that AGF violated the automatic stay. The complaint alleges in relevant part "American General made regular and repeated telephone calls to Ms. Bassett's home during the pendency of Ms. Bassett's bankruptcy proceedings to demand repayment of its loans."

A creditor does not, absent some sort of harassment or coercion, violate the automatic stay by asking debtor to sign a reaffirmation agreement. *In re Duke, 79 F.3d 43, 45 (7th Cir. 1996); Cox, 242 B.R. at 449; Wiley, 224 B.R. at 66.* There is no reason to depart from this rule in the present case merely because the reaffirmation agreement is unenforceable. See *Wiley, 224 B.R. at 66* (not a violation of stay to seek reaffirmation agreement that is unenforceable because not filed with court).

Because the complaint can reasonably be construed to allege that AGF harassed or coerced Debtor into signing the reaffirmation agreement at a time when the automatic stay was still in effect, it states a claim upon which relief can be granted.

The bankruptcy court erred in dismissing Debtor's second claim for relief.

V

Preemption of State Law Claims

Two of Debtor's claims are predicated upon theories of Washington state law.

Debtor's fourth claim for relief alleges "the unenforceability of the reaffirmation agreement entered into with Ms. Bassett and the Class is the proper subject for relief

under Washington's Consumer Protection Act, RCW Ch. 19.86." Debtor's brief does not explain what provision of the Washington statute Debtor invokes or what relief is sought thereunder. The complaint, however, does make plain that Debtor is attempting to employ state law as a remedy for AGF's use of a reaffirmation agreement that violates federal bankruptcy law.

Debtor's fifth claim for relief seeks recovery of funds collected under the reaffirmation agreement under state-law theories of unjust enrichment and constructive trust.

The courts have uniformly held that federal law provides the sole remedy for violation of § 524 and that all state-law claims are preempted. *Bessette, 230 F.3d 439, 2000 WL 1585090* at *7; *Walls, 2000 WL 1469029* at *6-8; *Cox 242 B.R. at 449-50; Rogers, 233 B.R. at 109-110; Pereira, 223 B.R. at 31-32.*

These decisions are based on the conclusion that Congress established its own remedies for abuse of the bankruptcy process, and that Congress intended those remedies to occupy the field. *Bessette, 230 F.3d 439, 2000 WL 1585090* at *7; *Walls, 2000 WL 1469029* at *7; *Cox, 242 B.R. at 450; Rogers, 233 B.R. at 110.*

Although the Ninth Circuit has not specifically addressed remedies for the misuse of reaffirmation agreements, it has held in other contexts that the Bankruptcy Code and Federal Rules of Bankruptcy Procedure provide the sole remedy for wrongful conduct in bankruptcy proceedings. *MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 913-16 (9th Cir. 1996); Gonzales v. Parks, 830 F.2d 1033, 1035-37 (9th Cir. 1987).*

We hold that the federal statutory scheme entailed in the Bankruptcy Code is so pervasive with respect to the regulation of reaffirmation agreements that Congress intended to occupy the field to the exclusion of state law. Accordingly, the bankruptcy court did not err in dismissing Debtor's fourth and fifth claims for relief.

VI

Truth in Lending Act

Debtor contends that the bankruptcy court also erred in dismissing her claim under the Truth in Lending Act, *15 U.S.C. § 1601*, et seq. (TILA). Debtor argues "creditors must comply with the requirements of the TILA in all their actions related to reaffirmation agreements. See *In re Kamps, 217 B.R. 836 (Bankr. C.D. Cal. 1998).*" This argument is unpersuasive.

Reaffirmation agreements are exempt from TILA. That statute expressly authorizes the Board of Governors of the Federal Reserve to promulgate regulations to carry out the purposes of the Act. *15 U.S.C. § 1604*(a). The Board adopted Regulation Z, 12 C.F.R. 226 (1998), to describe the disclosures that a lender must make in consumer credit transactions. In specifying the new disclosures required when there is a change in a credit agreement, Regulation Z states that no new disclosures are required where the change results from "an agreement involving a court proceeding." 12 C.F.R. § § 226.9(c)(2); 226.20(a)(3). The Official Staff Commentary to C.F.R. § 226.20(a)(3) states that this exception includes reaffirmation agreements regarding debts discharged in bankruptcy.

Debtor's reliance on Kamps is misplaced. In that case, the debtor's attorney had not certified the reaffirmation agreement. Thus, under § 524(c)(6), the bankruptcy court was required to determine whether the agreement imposed an undue hardship on the debtor and whether making the agreement was in the best interest of the debtor. The court held that Regulation Z left it to the court to determine whether any new disclosures were necessary. The court then held that it would not approve the reaffirmation agreement unless the creditor provided new disclosures. *Kamps, 217 B.R. at 850.* We need not decide whether Kamps was correctly decided, because it does not address the question presented here. Kamps did not hold that a creditor may be held liable under TILA for obtaining a reaffirmation agreement without new disclosures. To the contrary, Kamps expressly acknowledges that Regulation Z exempts

reaffirmation agreements from the new-disclosure requirements.

We see no reason to conclude that the TILA exemption for reaffirmation agreements does not apply in the present case simply because we have concluded that the AGF reaffirmation agreement is not enforceable under § 524(c). If new disclosures are not required where the debtor becomes subject to a binding obligation by making a reaffirmation agreement, disclosure should not be required where the debtor does not become subject to a binding obligation.

The bankruptcy court did not err in dismissing Debtor's sixth claim for relief.

CONCLUSION

We reverse the bankruptcy court's determination that the reaffirmation agreement is enforceable. We reverse the dismissal of Debtor's claims for civil contempt and violation of the automatic stay. We affirm the dismissal of Debtor's damage claim under § 524 and Debtor's state-law and TILA claims. We remand for further proceedings consistent with this decision.

Footnotes

n1 The Honorable Thomas E. Carlson, Bankruptcy Judge for the Northern District of California, sitting by designation.

n2 The Honorable Ellen Carroll, Bankruptcy Judge for the Central District of California, sitting by designation.

n3 Debtor also argues that the AGF reaffirmation agreement is unenforceable because it states that rescission of that agreement constitutes a default on the underlying debt. We agree that the rescission-as-default language poses a risk for serious abuse of the reaffirmation process. If the debtor was not otherwise in default under the loan, treating rescission of the reaffirmation agreement as creating a default would modify the loan agreement and significantly chill the debtor's exercise of the right to rescind by creating consequences of rescission not contemplated in § 524(c). See generally *In re Ireland, 241 B.R. 539, 540 (Bankr. E.D.*

Mich. 1999); Wiley v. Mason (In re Wiley), 224 B.R. 58, 71 (Bankr. N.D. Ill. 1998), vacated on other grounds, *237 B.R. 677 (Bankr. N.D. Ill. 1999)*. Such a result would be contrary to Congress' intent freely to permit debtors to rescind reaffirmation agreements. Even if the debtor was otherwise in default, the language would still be misleading in that it does not clarify that the debtor would still have no in personam liability on the discharged debt following rescission of the reaffirmation agreement. We need not decide whether the rescission-as-default language by itself renders the AGE reaffirmation agreement unenforceable, however, as we conclude the agreement is unenforceable because the required right-to-rescind language is not conspicuous.

n4 It is an open question whether a debtor can recover punitive damages in a civil contempt proceeding for violation of the discharge injunction. Some decisions state that the court may award punitive damages. *Bessette, 230 F.3d 439, 2000 WL 1585090* at *4 (citing cases) . These decisions do not, however, address the traditional distinction between civil and criminal contempt. A contempt proceeding is civil if the purpose is remedial and intended to coerce compliance. *Mackler Prods., Inc. v. Cohen, 146 F.3d 126, 128-29 (2d Cir. 1998); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 877 F.2d 787, 790 (9th Cir. 1989); Costa, 172 B.R. at 966.* Punishment for past conduct can be imposed only through criminal contempt proceedings, which are generally initiated only by the government or the court. Id.

n5 Section 362(h) provides:

An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

n6 The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353: (1) extended the time limit for rescission from 30 to 60 days; (2) required that right-to-rescind language be conspicuous; and (3) eliminated the requirement that the court determine whether the

reaffirmation agreement will benefit the debtor if the debtor's attorney signs the agreement. The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, made discharge hearings discretionary where the debtor does not seek to reaffirm a debt. The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394: (1) made discharge hearings discretionary even where the debtor seeks to reaffirm a debt if the debtor's attorney signs the reaffirmation agreement; and (2) required that a reaffirmation agreement state conspicuously that the debtor is not required to sign such an agreement. See 4 Collier on Bankruptcy P 524.LH (15th ed. rev. 1996).

n7 *11 U.S.C. § 105*(a) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Case No. 97-6041
UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re
DARLENE M. BASSETT,
Debtor.

Adversary No. 99-9635

DARLENE M. BASSETT,
Plaintiff,

v.

AMERICAN GENERAL FINANCE, INC.,
Defendant.

JUDGMENT ON THE PLEADINGS AND DISMISSAL WITH PREJUDICE

This matter having come before the Court on defendant American General Finance, Inc.'s Motion for Judgment on the Pleadings (the "Motion"), the Court having considered the pleadings submitted by the parties in connection therewith, and heard the arguments of counsel, and good cause appearing therefore,

It is hereby ORDERED as follows:

1. The Motion is granted;

2. Defendant American General Finance, Inc. is entitled to judgment on the pleadings;

3. This action is hereby dismissed with prejudice. Defendant is entitled to costs in accordance with law.

DATED this, 21,day of January, 2000.

United States Bankruptcy Judge

Submitted by:

PERKINS COIE LLP

By,
Alan D. Smith, WSBA #24964
Elizabeth A. Alaniz, WSBA #21096
Frederick B. Rivera, WSBA #23008
Attorneys for American General Finance, Inc.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. 97—06041

In re
DARLENE M. BASSETT,
Debtor,

Case No. A99—09635

DARLENE M. BASSETT,
Plaintiff,

v.

AMERICAN GENERAL FINANCE, INC.,
Defendant.

TRANSCRIPT OF THE PROCEEDINGS
BEFORE THE HONORABLE THOMAS T. GLOVER
FRIDAY, JANUARY 21, 2000

Reported by: Shari L. Ahearn CCR# AH-EA-RS-L386BW

APPEARANCES

For the Plaintiff: MR. FREDERICK W. SCHOEPFLIN
Attorney at Law
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For the Defendant: MR. ALAN C. SMITH
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SEATTLE, WASHINGTON; FRIDAY, JANUARY 21, 2000
9:30 A.M. SESSION

THE COURT: Let's take the Bassett case next. The challenge here is to a reaffirmation agreement. First of all, there are really two issues, as I see it, conspicuous language and then hones in on language involving the rescission provisions of the agreement.

This particular agreement was signed some time ago, and the record discloses that then counsel for the debtor did sign the form agreement along with the debtor.

Mr. Schoepflin, go ahead.

MR. SCHOEPFLIN: It's not my motion.

THE COURT: That's right. It goes the other direction.

MR. SMITH: Yes, Your Honor. Al Smith, Perkins Coie for the creditor, American General Finance.

Your Honor, your summary of the facts is certainly correct. I think our papers have been pretty clear in terms of what the law is; what is clear and conspicuous; and what is required.

And it is an objective person – would a reasonable person have noticed this language? That's the test. It doesn't say it's got to be in bold; it's got to be underlined; it's got to be any of those other things.

Your Honor, this is a reaffirmation agreement that contains three sentences between the caption and the signature, three sentences. And two of those sentences are exactly the statutory required language.

Your Honor, I submit that this is no different from a telegram where every provision under the law is considered conspicuous. A reasonable person could not possibly have missed something a half an inch above her signature when

there's only three things. This wasn't buried. This was right there in front of her.

Now, Your Honor, I have brought with me and would be happy to present to the Court copies of the documents that we refer to as the standard reaffirmation agreements that are dismissively referred to as unofficial by the plaintiff. And yet, Your Honor, they are not unofficial; they are not, quote, official in the sense of having been adopted by the Supreme Court. They were, however, issued by the administrative office, including one, Your Honor, that was recently published, apparently issued some time last year, published in the 2000 editions of these things, in which even now, while some of the language is underlined, some of this statutorily required language is still not underlined.

I would request the opportunity to simply hand this up to the Court and ask the Court to take judicial notice of it. With the exception of that 2000 forum, which of course we did not have at the time, these are the same documents that were referred to in our pleadings. And I think that's entirely appropriate.

Your Honor, with respect to the other issue; that is, whether the inclusion of an additional sentence made anything unclear, we submit that it could not have; that this was a sentence that was in fact absolutely true; that if you rescind the reaffirmation agreement, it will be considered a default under the installment agreement.

In other words, you still owe the money unless you get discharged. That means there may be a non-dischargeability action. You may have to turn over the collateral, whatever it might be. It's a true statement. It is not misleading. It is absolutely right out there.

And, Your Honor, once again, I submit that no reasonable debtor, whether or not represented by counsel, would have a problem with that. And this debtor was represented by counsel who affirmed and certified under penalty of perjury

that she explained all of this to the debtor.

Your Honor, we don't think there's any issue here. We don't think you have to reach all of the issues of remedies or anything of those other things that take up three-quarters of the briefs. The reaffirmation agreement was just fine.

THE COURT: What effect does the presence of the lawyer's signature have, if any?

MR. SMITH: There is a presumption in favor of reaffirmation agreements that have been attested to by lawyers. We cited a couple of cases to that effect. I acknowledge that is not conclusive. But where the argument is, Golly, gee, this language is somehow marginally deficient so that somebody might have been misled - - when you've got your own lawyer who has certified that, I've been through with this stuff with the debtor, and I explained it, and she understands the consequences, and she's got the resources, and she can do it - - all those different things, Your Honor, then the presence of that attorney's certification I believe is quite significant.

THE COURT: Okay. Mr. Schoepflin?

MR. SCHOEPFLIN: Your Honor, Frederick Schoepflin for the debtor, Darlene Bassett.

Let me begin by just reminding the Court that we did cite a case in which a Court invalidated reaffirmation agreements that otherwise appeared to be totally in compliance, unlike American General's agreement, that had been verified by debtor's counsel; and the Court inquired into it and found out that in fact debtor's counsel had not fully informed the debtors and, therefore, invalidated the agreements.

So if the agreement itself is defective and therefore void, the signature of the debtor's attorney does not validate it.

Default, Your Honor, means either a failure to do something

that you're required to do or doing something that you're not supposed to do. Rescission means a return to the status quo, to the way that things were.

Now, the sentence that is in American General's reaffirmation agreement doesn't say that if you rescind this, we'll go back to the way things were. Maybe the loan was in default; maybe it wasn't. Maybe you've made all of your payments; maybe you haven't. What it says is that the act of rescission itself will be a default of the original agreement.

And no matter how that is covered over, it can only mean that it's some kind of a hammer that says to the debtor, Look, you can rescind this if you want to; but you better watch out because if you do, we've got this hammer and we're going to bring it down on your head.

So I think that that's enough on that issue. I think that the purpose of that threat is pretty obvious. I don't think it was to clarify what the word "rescission" means.

Assuming that all of Ms. Bassett's allegations are true, which we have to do in the context of this motion for a judgment on the pleadings, and assuming that the agreement does violate Section 524, then we have the question, should Ms. Bassett be allowed to proceed with her cause of action in a private capacity in a private right of action?

And we argue that there are many reasons why it's necessary for her to have this private right of action, even though it's not expressly provided for in Section 524 of the Bankruptcy Code.

Among those reasons and I've pretty much briefed these, but there's the issue of the burden of proof. If it's a damage action, the burden of proof is a preponderance of the evidence. If we have to go forward with a contempt action, then it is clear and convincing evidence. And there's no logical reason why the plaintiff should be put to this higher burden and denied a right to maintain an action for damages.

Under Supreme Court precedent that we have cited, if the agreement is found to be void, then Ms. Bassett and all of the other debtors that have been involved with this agreement are entitled to a declaration that the agreement is void, an injunction against enforcement, and restitutionary damages, which would come in a damages action.

Many Courts - - and we've cited a list of these Courts - - have awarded damages for violation of Section 524. They haven't expressly addressed the issue of whether or not a private right of action is allowed under 524. But by allowing these actions to proceed and awarding damages, they implicitly approve that type of action.

At least one Court - - a District Court in California - - has in fact directly addressed the issue and has held that the debtor does have a private right of action under Section 524.

There are some Courts that have gone the other direction. We simply think these are wrong.

The most important thing that a debtor gets in a bankruptcy case is the debtor's discharge. During the time that the bankruptcy is proceeding, the debtor has certain protections. The Bankruptcy Judge supervises everything. There's a trustee involved. And there are various protections.

After the discharge, the debtor is out on her own and far more vulnerable. And it just doesn't make any sense at all to say that at that point she should not be given a private right of action.

If the test were the test that is advocated by American General, then the Supreme Court case of Cort v. Ash would have no meaning because American General says, Look, congress knows how to provide for a right of action. If they don't provide one, there isn't one.

Well, that's contrary to Cort v. Ash, which gives a four-part

test for determining whether or not there is an implied right of action.

Ms. Bassett and all of the other debtors that are involved with these reaffirmation agreements satisfy that test. The test is, is the plaintiff one of the class for whose special benefit the statute was enacted? Obviously, that element is satisfied here.

Is there any indication of legislative intent, explicit or implicit, to create a remedy or deny one? Again, under the Cort v. Ash case, this prong is satisfied. It is clear that Section 524 grants debtors certain rights, and there's no indication that congress intended to deny them a remedy for violation of those rights.

It's not necessary, in that case, to show a specific intent to create the private right of action. And under that analysis, prong two is satisfied.

In fact, I would suggest that the reason there's not an expressed private right of action is because it's so obvious that with this kind of a strong benefit that's given to the debtor, there has to be a private right of action for that debtor in the event that that right is violated.

The third prong is the remedy consistent with the underlying legislative purpose?

Well, absolutely. The purpose of the statute is to protect debtors from overreaching creditors who might violate their discharge. And certainly a private right of action is consistent with that purpose.

Finally, is the cause of action one traditionally related to state law so as to make inference of a federal cause of action inappropriate?

Well, certainly that one is satisfied here because we have a federal statute.

Ms. Bassett satisfies all of those prongs. I will just say a word about the preemption of state law actions.

THE COURT: Let's talk about something that I'm much more concerned about.

Let's presume you've got a right of action. Do you have one in this case in the pleadings as they've been set forth? That's the remedial side.

Let's give you arguendo. The other side wouldn't do this, but let's presume you can recover damages - - in the standing suit, you can recover damages. Can you recover in this case?

MR. SCHOEPFLIN: Well, yes, Your Honor, I think so.

THE COURT: Why?

MR. SCHOEPFLIN: Because we have a reaffirmation agreement that fails to follow the statute and put in conspicuous language the debtor's right to rescind.

THE COURT: Well, that kind of covers them both, doesn't it - - I mean, both of your arguments - - conspicuous language and right to rescind?

MR. SCHOEPFLIN: Right.

THE COURT: But what do we do with the fact that the debtor's lawyer advised the debtor to sign this?

MR. SCHOEPFLIN: Well, that remains to be seen, Your Honor, in the evidence that comes out. I'm not sure that she was properly advised. And certainly we do have the example of the Bankruptcy Court, which on its own raised this issue and brought in counsel for the debtors that had signed off on agreements, and asked them how fully did they inform the debtors. And when it came to light that they weren't fully informed, the Court said, All right, it doesn't make any difference that debtor's counsel signed off; these agreements

are not valid.

THE COURT: I'll grant the motion for judgment on the pleadings. Here's why.

First of all, I don't think there's any problem with the conspicuous language here.

You may have an argument, Mr. Schoepflin, with regard to the rescission issue. But it seems to me that that issue is subsumed in the fact that the debtors lawyer certified to this Court, by signing the agreement - - there's substance to that certification. I don't think you can go behind it.

I suppose I should never say, never. But in most of the cases, I don't think you can go behind that certification because as a result of that certification, the Court then does not bring the debtor before it and ask all of the questions which would have cleared up any issue involving rescission in this or arguably any other case. Because the statute sets out what the Court is supposed to do.

So once there's a certification, that's a substantive thing. I don't think the Court can bring the person in and say, Well, did you really do this?

Now, the debtor may have a cause of action against an attorney for not advising them appropriately. But the substance of what's before me requires, in my view, that you can't challenge these. If they've been certified by a lawyer, I think that does it.

MR. SCHOEPFLIN: Your Honor, in this case, the debtor's counsel didn't even show up at the meeting where counsel for American General came in and gave these reaffirmation agreements to the debtor.

THE COURT: Well, that might be true. But there's no indication that she didn't have a chance to look at them and talk to her client. In fact, that's what she's certifying to this

Court, is that she has done exactly that.

There are times when a Court must look to its officers and say, You're certifying something to us, aren't you? That's right.

And the Court says, We're relying on that.

That's one of these cases, so I'll dismiss the case on the pleadings.

Either way this probably goes up on appeal. It's a good issue to argue. But as I say, I think this is the better result and gives attention to the appropriate system of bankruptcy.

Of late there has been a fair amount of challenge to reaffirmation agreements, and rightfully so. But at the same time, the statute provides for them, and the Court has an obligation to give respect to those provisions.

MR. SMITH: Your Honor, I have an order. It is identical to the one that was attached to our pleadings.

THE COURT: I'll sign it because the issues that are going to be raised - -

MR. SCHOEPFLIN: Would Your Honor make a finding that there is a private right of action?

THE COURT: No. I don't get to any of those issues because of my determination here.

Okay. I've signed the order.

Anything else that needs to come before the Court this morning?

(NO RESPONSE.)

THE COURT: We'll be at recess.

(THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE

I, Shari L. Ahearn, hereby certify that:

the foregoing pages represent an accurate and complete transcription of the proceeding before The Honorable U.S. Bankruptcy Judge presiding in the aforementioned matter; and

that these pages constitute the original or a true copy of the transcript of the proceeding.

Signed and dated this 23rd day of March, 2000.

by: Shari L. Ahearn
Certified Court Reporter
CCR# AH-EA-RS-L386BW

Not for Publication
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re
DARLENE M. BASSETT,
Debtor.

No. 01-35001
BAP No. WW-00-01071-CCaK

AMERICAN GENERAL FINANCE, INC.,
Appellant,

v.

DARLENE M. BASSETT,
Appellee.

No. 01-35058
BAP No. WW-00-01071-CCaK

DARLENE M. BASSETT,
Appellant,

v.

AMERICAN GENERAL FINANCE, INC.,
Appellee.

ORDER

Before: KOZINSKI, RYMER and SILVERMAN, Circuit Judges.

The petition for rehearing en banc is rejected. Fed. R. App. P. 35.

REAFFIRMATION AGREEMENT

Debtor's Name: DARLENE MARIE BASSETT

Bankruptcy Case No. 97-06041

INSTRUCTIONS

1) Write debtor's name and bankruptcy case number
2) Part A must be signed by both the debtor & creditor
3) Part B must be signed by the attorney who represents the debtor in this bankruptcy case.
4) Part C must be completed by the debtor if the debtor is not represented by an attorney.
5) File the completed form by mailing or delivering to the Bankruptcy Court.
6) Attach written agreement, if any.

PART A – AGREEMENT

Creditor's Name & Address AMERICAN GENERAL FINANCE
Summary of Terms of New Agreement

a) Account #
b) Principal amount $ 2,103.32 – subject to review of prior payment
Interest rate (APR) @ 12.00 %
Monthly Payments $39.00
c) Description of security: LOVESEAT CHAIR, OTTOMAN, CHAIR, OTTOMAN PURCHASES FROM DANIA FURNITURE/SEATTLE (ALSO, COSIGNER ON ACCOUNT;DEBORAH MILLER)
d) Account Status: Next Due: 8/1/97
e) $2,103.32

PER TERMS OF CONTRACT DATED: 11/2/96

Date of Discharge Hearing

The parties understand that this agreement is purely voluntary and that the debtor may rescind the agreement at any time prior to discharge or within 60 days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the creditor. Rescission of the Reaffirmation Agreement shall be considered default under the terms and conditions of the Installment Agreement referred to above.

THE DEBTOR UNDERSTANDS THAT THIS AGREEMENT IS NOT REQUIRED UNDER TEE UNITED STATES BANKRUPTCY CODE TITLE 11 U.S.C. AND NOT REQUIRED UNDER NON BANKRUPTCY LAW OR ANY AGREEMENT NOT IN ACCORDANCE WITH THE PROVISION OF 11 U.S.C. SECTION 524(C).

Signature of Debtor: DARLENE M. BASSETT
Date: 7/2/97

Signature of Creditor
GEORGIENNE HYDEN

PART B - ATTORNEY'S DECLARATION

THIS AGREEMENT REPRESENTS A FULLY INFORMED AND VOLUNTARY AGREEMENT THAT DOES NOT IMPOSE AN UNDUE HARDSHIP ON THE DEBTOR OR ANY DEPENDENT OF THE DEBTOR. FURTHER, AS ATTORNEY FOR THE DEBTOR, I HAVE FULLY ADVISED THE DEBTOR OF THE LEGAL EFFECT AND CONSEQUENCES OF SUCH AGREEMENT AND OF THE LEGAL EFFECT AND CONSEQUENCES OF DEFAULT UNDER SUCH AGREEMENT.

DATE: 7/2/97
RUTH NELSON— Signature of Debtor's Attorney

PART C – MOTION FOR COURT APPROVAL OF AGREEMENT- COMPLETE ONLY WHEN DEBTOR IS NOT REPRESENTED BY AN ATTORNEY

I (we), the debtor, affirm the following to be true and correct:

1) I am not represented by an attorney in connection with this bankruptcy case
2) My current monthly net income is,
3) My current monthly expenses total , including any payment under this agreement.
4) I believe that this agreement is in my own best interest because:

Therefore, I (we) ask the court for an order approving this reaffirmation agreement.

Date: Signature of Debtor

Signature of Debtor

PART D – COURT ORDER

THE COURT GRANTS THE DEBTOR'S MOTION AND APPROVES THE VOLUNTARY AGRREMENT UPON THE TERMS SPECIFIED ABOVE.

DATE:

Bankruptcy Judge
SAMUEL STEINER